

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Health

Regulation/Package Title: Chapter 3701-64 - Abuse or Neglect of Resident or Misappropriation of Property in Long-Term Care Facilities

Rule Number(s): 3701-64-01 to 3701-64-05

Date: December 1, 2017 Resubmitted May 16, 2018

Rule Type:

☐ New

☒ Amended

☐ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

In general, the Ohio Department of Health is amending these rules to harmonize with changes to the enabling statutes in 139 HB 49.

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3701-64-01 - The rule sets forth the definitions used in Chapter 3701-64 of the Administrative Code.

Amendments have been made to include revised definitions of “abuse” and “sexual contact,” and to add new definitions of “exploitation,” “physical abuse,” “psychological abuse,” “sexual abuse,” and “sexual conduct.”

Minor changes have been made to conform with Legislative Services Commission rule drafting requirements.

3701-64-02 - The rule sets forth the requirements for ODH to conduct investigations of allegations of abuse or neglect, requirements for the content of a notice, and the hearing rights of an accused.

Amendments have been made to (1) add “exploitation” throughout the rule; and (2) clarify those records the Director of Health is permitted to review as part of an investigation into alleged abuse, neglect or exploitation of a resident, or of misappropriation of a resident’s property; and (3) Require facilities to keep documents the facility reviewed during its own investigation. Requirements related to a facility’s responsibility during an investigation have been updated to include when a facility knows an investigation is about to be instituted.

Minor technical amendments have also been made to conform to the Legislative Services Commission’s rule drafting standards and to correct a misspelling.

3701-64-03 – This rule sets forth the timeframes for both an accused to request a hearing and for the director to hold a hearing.

“Exploitation” has been added to this rule.

3701-64-04 – This rule sets forth the procedures to be used in a hearing.

“Exploitation” has been added to this rule.

3701-64-05 – This rule sets forth the procedures for ODH to follow when making a finding of abuse or neglect. The rule also sets forth the procedures for an individual who has a single finding of neglect must follow to petition ODH for removal from the nurse aide registry.

“Exploitation” has been added to this rule.

2. **Please list the Ohio statute authorizing the Agency to adopt this regulation.**

Section 3721.26 of the Revised Code.

3. **Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

If yes, please briefly explain the source and substance of the federal requirement.

No.

4. **If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

No.

5. **What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

Collectively, these rules serve to protect the health and safety of residents in Ohio's long term care settings (nursing homes and residential care facilities) by requiring the report of allegations of abuse, neglect, or misappropriation to ODH for investigation. When there is sufficient evidence to warrant a finding against an individual, that individual is barred from working in another long term care setting.

6. **How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Successful outcomes are measured through a standard survey (inspection) process. This process is generally conducted once every fifteen months. Successful outcomes would be indicated by a finding of compliance with the proposed rule requirements. Further evidence of success would be represented by the number of complaints received and the number of validated complaint surveys.

Additionally, the number of hearings against accused individuals and the number of findings are a measurable outcome.

Development of the Regulation

7. **Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

If applicable, please include the date and medium by which the stakeholders were initially contacted.

ODH personnel discussed the proposed rules with the following entities during Long Term Care Provider Meetings held at ODH.

Department of Medicaid, and

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Department of Aging;
Academy for Senior Health Sciences;
Leading Age Ohio;
Ohio Assisted Living Association; and
Ohio Health Care Association.

What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

No input was given during these meetings.

- 8. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

Not applicable.

- 9. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

ODH did not consider any alternatives to the proposed regulation. Section 3721.26 of the Revised Code requires ODH to prescribe requirements in this area. The rule reflects the current statutory requirement.

- 10. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

A performance based regulation was not deemed appropriate for this standard and not authorized by statute.

- 11. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

The agency conducted a thorough review of the Ohio Revised Code and Ohio Administrative Code to ensure there are no other regulations in place regarding investigations and hearing processes for allegations of abuse, neglect or misappropriation. While Title 29 of the Revised Code provides for criminal penalties in this area, which may also result from an investigation, neither section 3721.26 of the Revised Code nor Chapter 3701-64 of the Administrative Code provide for criminal penalties.

- 12. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

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An on-site survey may be initiated to determine compliance with this rule. The survey will be done by long-term care program staff using a standard survey tool. This staff will have been trained in the survey process, including understanding of the regulation.

Additionally, trained and knowledgeable abuse, neglect and misappropriation program staff may also conduct an investigation into an allegation of abuse, neglect and misappropriation.

Adverse Impact to Business

13. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

As of January 26, 2018, there are:

955 licensed nursing homes; and

710 licensed residential care facilities.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

Notification to the Department of allegation of abuse, neglect or misappropriation by an individual associated with the facility.

Maintaining records related to the investigation, including audio/visual records.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

ODH estimates approximately 15 minutes of facility staff time is dedicated to reporting an allegation of abuse, neglect or misappropriation to ODH at an average hourly wage of \$54.60 and assuming each notification was done by the facility administrator.

*All figures from United States Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages for the State of Ohio, May, 2015, using the code for Medical and Health Services Managers (11-9111).

While facilities generally maintain these records as a normal course of business, maintaining the audio/visual records could require a facility to invest in compact

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discs/digital video discs, jump/flash drives, and/or hard drives. Cost can range from \$5 to \$500, depending on the media the facility selects.

14. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

These rules implement sections 3721.21 to 3721.26 of the Revised Code, which serve to protect the health and safety of residents in Ohio's long term care settings (nursing homes and residential care facilities).

Regulatory Flexibility

15. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No. The reporting of allegations of abuse, neglect and misappropriation is required regardless of the size of the business.

16. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the

ODH's policy in this area is available online on the ODH Regulatory Mission page at: <https://www.odh.ohio.gov/rules/regulatory.aspx>.

17. What resources are available to assist small businesses with compliance of the regulation?

The agency maintains program staff that can assist and provide guidance to licensees through the Bureau of Survey and Certification:

<http://www.odh.ohio.gov/odhprograms/ltc/nurhome/nurhome1.aspx> (nursing homes), <http://www.odh.ohio.gov/odhprograms/ltc/Residential%20Care%20Facilities/Main%20Page.aspx> (residential care facilities), as well as the Bureau of Regulatory Operations: <http://www.odh.ohio.gov/odhprograms/rc/ANM.aspx> (Investigations of Abuse, Neglect, Exploitation and Misappropriation).